Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 627,

Petitioner,

v.

GEORGE E. HOFFMAN & SONS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent does not agree that the questions presented are as stated by Petitioner. Rather, the real and only questions involved in the instant case are:

1. Whether, under the work preservation doctrine, a local union may lawfully strike a construction industry employer to preclude subcontracting certain off-site work to subcontractors who do not exclusively employ its members?

2. Whether, pursuant to the "clearly erroneous" standard set forth in F.R.C.P. Rule 52(a), a court of appeals may properly draw its own inferences and conclusions from the facts as established by the trial court and undisputed record evidence concerning the objects of a strike engaged in by a labor organization?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet officially reported (Pet. App. A-1-24). Also as yet unreported is the Court's Order on Rehearing (Pet. App. A-25-30), wherein such opinion was modified and Petitioner's petition for a rehearing denied. An earlier decision of the Court of Appeals is unpublished, but noted at 530 F.2d 979 (Pet. App. A-36-45). The Order of the United States District Court for the Southern District of Illinois, after trial of this case on the issue of liability, is not officially reported, but can be found at 99 LRRM 3236 (Pet. App. A-31-35). Earlier Orders

of the District Court are reported at 352 F. Supp. 627 (Pet. App. A-46-60) on such issue, and at 384 F. Supp. 1252 (Pet. App. A-61-68) on the issue of damages.

STATEMENT OF THE CASE

The "summary of facts" outlined by Petitioner is in part inaccurate and fails to include the salient facts which caused the Court of Appeals to reverse the judgment of the trial court. For a complete portrayal of such facts as the Court of Appeals saw them—and as they really are—see Pet. App. A-1-12.

On page 3 of the Petition, Petitioner states that Respondent and two of its hauling subcontractors, Long Rock and C. A. Walker Truck Lines, were parties to the Articles of Construction Agreement. However, as stated by the Court of Appeals, Respondent became bound to such Agreement as a consequence of its membership in the Associated General Contractors of Illinois, which had negotiated such Agreement on behalf of its members. Long Rock and Walker Lines, who were not members of this association, subsequently became bound to such Agreement when they separately and independently adopted it as their own (Pet. App. A-3, 17). Therefore, Petitioner's factual contention that such Agreement established a single, multi-employer bargaining unit is in error. While Respondent was a member of one bargaining unit, multi-employer in scope because it consisted of Respondent and other employer members of the Associated General Contractors of Illinois, the drivers employed by Long Rock and Walker Lines comprised other, separate single employer bargaining units (Pet. App. A-18).

On page 6 of the Petition, Petitioner states that the Court of Appeals "discredited" Barker's testimony in that it found Petitioner sought to prohibit the use of any Local 15 drivers by Respondent's subcontractors. However, the Court of Appeals

did nothing of the kind since that Court specifically stated: "To the extent that the evidence is conflicting, we rely primarily on the testimony of Robert Barker. . . , since that is the only evidence referred to by [Petitioner] to support the district court's decision." (Pet. App. A-2 n. 3).

REASONS FOR DENYING THE WRIT

1.

The Court of Appeals, In Accord With This Court's Decisions, Properly Rejected Petitioner's Work Preservation Defense.

On pages 7-8 of the Petition, Petitioner appears to make two different arguments with respect to the work preservation doctrine's applicability to the instant case. First, Petitioner submits its strike directed against Respondent was simply an attempt to recapture work lost when Respondent sold five of its trucks. In contrast, Petitioner also contends it had the right to strike Respondent to "retain" construction hauling work for its "members" on Respondent's projects within Petitioner's "geographical territory" even when such work was performed by subcontractors, and not Respondent's employees.

Both theories advanced by Petitioner were properly rejected by the Court of Appeals in its well-reasoned decision (Pet. App. A-13-20). Nonetheless, Petitioner claims the failure of that Court to find merit in its work preservation defense conflicts with this Court's decisions. In this regard, Petitioner cites *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), and its companion case, *Houston Insulation Contractors Association* v. *N.L.R.B.*, 386 U.S. 664 (1967), to support the proposition that ". . . a union may exert pressure on an employer to preserve work traditionally performed or fairly claimable by the *union's members*" (emphasis added) (Pet. p. 7). However, these cases permit

such pressure to be applied only where a union's object is preservation of *bargaining unit* work, and not where such actions are "... calculated to satisfy union objectives elsewhere." *National Woodwork, supra* at 644-645. As the Court of Appeals held, Petitioner's strike was not limited to just regaining the jobs bargaining unit employees might have performed if Respondent had not sold five of its trucks (Pet. App. A-13-15).

In an attempt to bolster its argument, Petitioner also refers to a recent decision of this Court, *N.L.R.B.* v. *International Longshoremen's Association,* ____ U.S. ____, 48 L.W. 4765 (1980). However, the issue in that case was not whether the union was seeking to gain work for bargaining unit members as opposed to its members generally, but rather whether the work involved in the dispute was, although modified by technological innovation, the traditional work of bargaining unit employees. *Id.* at 4770-4771. Furthermore, the Court therein again repeated that the work preservation defense is available only to preserve work for "bargaining unit employees." *Id.* at 4769.

On page 8 of the Petition, Petitioner asserts: "When [Petitioner] first grieved the issue and then struck, it was merely reasserting its claim to work historically performed by *its* members, i.e., the [Respondent's] hauling for projects within the [Petitioner's] geographical territory." The problem with this contention is simply that Respondent itself employed only members of Petitioner on Respondent's projects in Petitioner's territory. Therefore, by its own admission, the object of Petitioner's strike against Respondent was the hauling work performed by Respondent's subcontractors who did not exclusively employ Petitioner's members. In this regard, the Articles of Construction Agreement specifically permitted such subcontracting by Respondent (Pet. App. A-4).

Although the Respondent's subcontractors had adopted the Articles of Construction Agreement, they did so separately and independently and, therefore, were not part of the multi-

employer bargaining group represented by the Associated General Contractors of Illinois. Thus, the respective employees of such subcontractors were not in the same bargaining unit with those of Respondent. *E.g., National Maritime Union* v. *Commerce Tankers Corporation,* 457 F.2d 1127 (2nd Cir. 1972); *Moveable Partitions, Inc.,* 175 NLRB 915, 917 (1969).

Since Petitioner's strike against Respondent was intended to benefit its members generally, and not simply those within the bargaining unit in which Respondent's employees were included,[1] the Court of Appeals properly, in accord with this Court's prior decisions, found that Petitioner had unlawfully asserted "secondary," rather than "primary," pressure against Respondent. Petitioner cannot, and should not, be allowed to escape liability by submitting that it was ". . . merely reasserting its claim to work historically performed by its members" (Pet. p. 8), when the work had been claimed for its membership generally—not just for its members who were part of the bargaining unit which included Respondent's employees.

2.

No Conflict Exists Among The Courts Of Appeals With Respect To The Work Preservation Doctrine's Applicability To The Facts And Circumstances Presented In The Instant Case.

On pages 9-11 of the Petition, Petitioner urges the Court to find that a conflict exists among the courts of appeals as to what work is subject to being "fairly claimable" by a union under the work preservation doctrine. Besides citing this Court's recent decision in *Longshoremen, supra,* Petitioner also relies on

[1] Petitioner sought to force Respondent to utilize subcontractors employing its *members* exclusively. However, Petitioner never attempted to require that those subcontractors' employees be within the *same* bargaining unit as Respondent's employees.

Canada Dry Corp. v. *N.L.R.B.*, 427 F.2d 907 (6th Cir. 1970); *Meat and Highway Drivers Local 710* v. *N.L.R.B.*, 335 F.2d 709 (D.C. Cir. 1964) and *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d 547 (8th Cir. 1969). However, the problem with its analysis is simply that this case has never turned on whether the work sought by Petitioner was fairly claimable, but rather on whose behalf it was being claimed. In this regard, the Court of Appeals corectly stated Respondent's position when it said: "[Respondent] has conceded that if the strike was thus limited [to regain the work lost by the sale of five of its trucks,] it was permissible as work preservation (Pet. App. A-13-14).

Petitioner further argues that the Court of Appeals improperly relied on the quantity of the work sought by Petitioner's strike in rejecting its work preservation defense when "... it sought work traditionally performed by its members within its geographical territory" (Pet. p. 10-11). This contention is not true. The Court of Appeals specifically stated (Pet. App. A-16 n. 20):

> Even if we accept the [Petitioner's] argument, there is still the question of whether a union's actions may be secondary because of the quantity of the work claimed from the primary employer. We need not consider that issue here, however, since the record shows that the [Petitioner] was attempting not to pursuade [Respondent] to do all its material hauling but to have the subcontractors use [Petitioner's] members on the project within [its] jurisdiction. Nowhere is there any indication that Barker asked [Respondent] to buy or rent additional trucks sufficient for all the hauling work. Instead, his concern was with the subcontractors' use of [non-members of Petitioner] on[the subcontractors'] own trucks.

The Petitioner also claims the Court of Appeals' decision creates a conflict as to what is the "... applicable unit for which work preservation demands may be made" (Pet. p. 11).

Petitioner's view is that it was privileged to preserve and protect construction hauling work for its *members* anywhere within its "geographical territory" without regard to being restricted in such purpose to any particular bargaining unit (Pet. p. 12). However, this contention is clearly without merit since it is now well settled that agreements and conduct intended to preserve, protect, acquire or reclaim work for union members *generally* (i.e. outside the *immediate* bargaining unit) do not fall within the protection of the work preservation doctrine because they exceed the legitimate interests of bargaining unit employees vis-a-vis their *own* employer, and are therefore calculated to satisfy union objectives elsewhere. *E.g., Griffith Company* v. *N.L.R.B.*, 545 F.2d 1194 (9th Cir. 1976); *National Maritime Union* v. *Commerce Tankers Corporation,* 457 F.2d 1127 (2nd Cir. 1972); *Local Union 282, Teamsters* (D. Fortunato), 197 NLRB 673 (1972).

Despite the existence of this well-established principle, Petitioner asserts that the Court of Appeals' decision, instead of being in accord with precedent, "created a conflict." In support of its position, Petitioner cited *Houston Insulation Contractors Association, supra,* for the proposition that ". . . work preservation demands need not relate directly to employees in the bargaining unit where action in support of the demand occurs" (Pet. p. 11). However, in that case, this Court established only that employees in one bargaining unit may strike in support of the work preservation claims of employees in another bargaining unit employed by the *same* employer. The obvious difference between the situation presented in that case as opposed to the facts in the instant case is that the union in *Houston Insulation* was not seeking to affect the labor relations policies of other than the *immediate* employer.

N.L.R.B. v. *Local Union No. 28, Sheetmetal Workers,* 380 F.2d 827 (2nd Cir. 1967), was cited by Petitioner to support its position that there can be more than one bargaining unit

directly involved in a lawful work preservation strike. That finding in no way conflicts with the holding in the instant case since there was no attempt by the union in that case to affect the labor relations policies of any employers outside of the bargaining units directly involved. *Id.* at 831. The opposite was true in the instant case since Petitioner admittedly was seeking to have subcontractors of Respondent replace their respective employees with members of Petitioner.

Orange Belt District Council of Painters No. 48 v. *N.L.R.B.*, 328 F.2d 534 (D.C. Cir. 1964), another case cited by Petitioner, was decided three years before *National Woodwork.* Moreover, the Court of Appeals in that case did not make a distinction between "principle work unit" and "bargaining unit", as Petitioner claims, but, instead, equated the two terms.[2] Had *Orange Belt* been decided after *National Woodwork,* that court would likely have used the term "bargaining unit" since, at p. 538, it did find that claimed work preservation conduct would be unlawful if its objectives were to ". . . extend beyond the [contracting] employer and are aimed really at the union's difference with another employer" (brackets appear in court's decision, citations omitted).

Respondent submits that Petitioner has failed to establish that the decision of the Court of Appeals conflicts with prior decisions of this Court or any other court concerning rejection of Petitioner's work preservation defense. Moreover, the instant case involves a unique fact situation unlikely to arise again and, therefore, the decision in this case is unlikely to affect anyone other than the parties. Furthermore, the Court has recently decided *N.L.R.B.* v. *International Longshoremen's Association,* ____ U.S. ____, 48 L.W. 4765 (1980), as well as *N.L.R.B.* v. *Enterprise Association of Pipefitters,* 429 U.S. 507 (1977), both of which explore and explain further the work

[2] See *United Mine Workers* v. *N.L.R.B.*, 399 F.2d 977, 979-980 (D.C. Cir. 1968).

preservation doctrine. Finally, the present case does not offer any issues of law concerning this doctrine which have not already been reviewed and resolved by this Court.

3.

The Court Of Appeals Properly Drew Its Own Inferences And Conclusions Concerning The Objects Of Petitioner's Strike Against Respondent.

As seen by Petitioner, the determination by the trial court that Barker was unaware at the time of the pre-job conference that Respondent had sold five trucks ends further inquiry regarding the object or objects of its strike against Respondent. However, this Court said in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 644 (1967):

> The determination whether [a disputed clause] and its enforcement violated 8(b)(4) . . . cannot be made without an inquiry into whether *under all the surrounding circumstances,* the Union's objective was preservation of work . . . , or whether the arrangement and boycott were tactically calculated to satisfy union objectives elsewhere.

In the application of this principle, it should be noted that the facts comprising the record before the Court of Appeals were not in dispute, nor were such facts in dispute in the trial court (except as to Barker's knowledge regarding Respondent's sale of trucks). However, whether Barker had such knowledge is really immaterial in determining liability in the instant case. The issue of liability in the Court of Appeals was dependent upon Respondent showing that *an* object of the Petitioner's strike against Respondent was proscribed by § 8(b)(4) and not immunized by the work preservation doctrine. Such an object was clearly inferable in this case from the undisputed record facts, which are based on documentary evidence, uncontradicted testimony, stipulated facts and deposition testimony—all of which disclosed the "surrounding circumstances"

into which *National Woodwork* requires inquiry. In this posture, where credibility is not a serious factor, it has been held that the findings of fact of a trial court are not binding on a reviewing court nor are they entitled to significant weight. *Shumaker* v. *Grabowski Industries, Inc.*, 352 F.2d 837 (7th Cir. 1965); *Wigginton* v. *Order of United Commercial Travellers*, 126 F.2d 659 (7th Cir. 1942), *cert. denied* 317 U.S. 636 (1942); Moore's *Federal Practice*, ¶ 52.04, and cases cited in n. 2. Where, as here, an issue exists as to inferences to be drawn from facts which are basically undisputed, the Court of Appeals was free of the "clearly erroneous" rule. *National Latex Products Co.* v. *Sun Rubber Co.*, 274 F.2d 224, 247 (6th Cir. 1959), and cases there cited; *Hillard* v. *Commissioner of Internal Revenue*, 281 F.2d 279, 282 (5th Cir. 1960).

Even if the "clearly erroneous" rule is applicable to the conclusion reached by the trial court—that Petitioner's strike did not have an object violative of § 8 (b) (4), but had as the *sole* object work preservation—the record evidence establishing the "surrounding circumstances" imports a definite and firm conviction, shared by the Court of Appeals, that a mistake was made by the trial court (Pet. App. A-14). Therefore, even if such result could be said to involve only a finding of pure fact (and not a legal inference, a mixed question of law and fact, or a question of ultimate fact), this Court has indicated that such finding may properly be set aside by a court of appeals. *United States* v. *United States Gypsum Company*, 333 U.S. 364 (1948). See also *C.I.R.* v. *Duberstein*, 363 U.S. 278 (1960); *Brown* v. *United States*, 419 F.2d 337 (8th Cir. 1969); *Franks* v. *National Diary Products Corp.*, 414 F.2d 682 (5th Cir. 1969); *Romero* v. *Garcia & Diaz, Inc.*, 286 F.2d 347 (2nd Cir. 1961), *cert. denied* 365 U.S. 869 (1961).

With respect to its determination concerning the object or objects of Petitioner's strike against Respondent, the trial judge concluded that "I cannot rule that [Petitioner's] actions were *inconsistent* with the work preservation objective" (emphasis

added). The basic deficiency in his analysis is that the issue whether Petitioner's actions were inconsistent with a work preservation object was *not* the question the trial court should have resolved. Instead, the relevant determination was whether all evidence concerning the "surrounding circumstances" established that work preservation was the *sole* object of the strike against Respondent. It is well settled that Petitioner was in violation of § 8 (b) (4) where even *one* of the objects of its strike was unlawful despite the existence of one or more other lawful objects. *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951).

In application of the foregoing principles, contrary to Petitioner's argument, the Court of Appeals did not overturn the trial court's credibility determination as to when Barker became aware of the sale of Respondent's trucks. Nor did such Court grant Respondent a trial de novo review of the trial court's findings of fact (expressly adopted from the original decision of the district court as to liability, except for when Barker became aware of the sale of Respondent's trucks). Instead, the Court of Appeals concluded that, in addition to a work preservation object, undisputed record evidence established that Petitioner's strike was *also* motivated by unlawful objects. It was therefore not improper for the Court of Appeals to reach this conclusion.

CONCLUSION

For the reasons stated above, the Petition should be denied.

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